

(ATTACHMENT 1)

CLD-245

May 24, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 07-1036

DARRYL ORRIN BAKER

VS.

UNITED STATES OF AMERICA, ET AL.

(W. D. Pa. Civ. No. 05-cv-00147E)

Present: RENDELL, SMITH AND JORDAN, CIRCUIT JUDGES

Submitted are:

- (1) By the Clerk for possible dismissal due to a jurisdictional defect;
- (2) Appellee's motion for summary action;
- (3) Appellant's response to possible dismissal due to a jurisdictional defect;
- (4) Appellant's response to motion for summary action;

in the above-captioned case.

Respectfully,

Clerk

MMW/MPD/je/par

O R D E R

The foregoing appeal is dismissed for lack of appellate jurisdiction. We have jurisdiction over appeals from final orders of the district court. See 28 U.S.C. § 1291. Orders that fail to dispose of all claims against all parties are not final and appealable orders unless the district court expressly and properly enters judgment and determines that there is no just reason for delay under Federal Rule of Civil Procedure 54(b). See, e.g., In re Good Deal Supermarkets, Inc., 528 F.2d 710, 712 (3d Cir. 1975). The District Court's memorandum order is not final under § 1291 because it did not dispose of all claims

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against all parties. An order dismissing a complaint without prejudice is generally not a final and appealable order. Brennan v. Kulick, 407 F.3d 603, 606 (3d Cir. 2005). Here the District Court dismissed the appellant's medical negligence claim but did so without prejudice and with the indication that the claim would later be permitted to proceed. Accordingly, the dismissal order is clearly not final or appealable. Furthermore, there was no request for either the Magistrate Judge or the District Court to certify the decision under Rule 54(b). Therefore, neither Judge ever considered whether the ruling should be certified for immediate appeal. The memorandum order also does not fall under the collateral order doctrine because dismissal of claims on account of sovereign immunity may be effectively reviewed on appeal from the final judgment. See, e.g., Kassuelke v. Alliant Techsystems, Inc., 223 F.3d 929, 931 (8th Cir. 2000). Because the Court lacks appellate jurisdiction, appellee's motion for summary action, requesting that the Court affirm the memorandum order, is denied.

By the Court,

/s/ D. Brooks Smith

Circuit Judge

Dated: June 7, 2007

par/cc: Mr. D.O.B.

R.L.E., Esq.

L.S.I., Esq.

**(ATTACHMENT 2)**

7004 1350 0002 9206 4609

July 31, 2007

Clerk of the Court  
United States District Court Judge  
Honorable Sean J. McLaughlin  
Western District of Pennsylvania  
17 South Park Row, Room A-250  
Erie, PA.  
16501

**RE: CIVIL ACTION NO. # 05-147-ERIE  
APPEAL ACTION NO. # 07-1036  
DARRYL ORRIN BAKER v. UNITED STATES OF AMERICA**

Dear Clerk of the Court:

Please find inside the Plaintiff's Motion for Certification on Claims  
That Where Not Final Pursuant to Fed. Rules. Civ. P. 54(b), three copies.

Thank you very much.

Respectfully submitted

BY

  
Darryl Orrin Baker  
Reg. No. # 19613-039  
Federal Correctional Institution  
P.O. Box 1000  
Sandstone, MN  
55072

ENCL:

cc: AUSA PAUL E. SKIRTICH

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

)  
**DARRYL ORRIN BAKER,** )  
Plaintiff, )  
)  
VS. ) C.A. NO. # 07-1036  
() W.D. PA. CIV. NO. # 05-CV-00147-ERIE  
**UNITED STATES OF AMERICA, ET.AL.** ) UNITED STATES DISTRICT COURT  
Defendant's. ) CHIEF JUDGE  
() HONORABLE MCLAUGHLIN  
()

MOTION FOR CERTIFICATION ON CLAIMS THAT  
WHERE NOT FINAL PURSUANT TO FED. RULES.  
CIV. P. 54(b)

NOW COMES the Plaintiff DARRYL ORRIN BAKER, (hereinafter "PLAINTIFF"), and proceeding pro-se, and respectfully moves this Honorable Court for Certification of Claims That Where Not Made Final Pursuant to Fed. Rules. Civ. P. 54(b) and for the reasons that follow.

(1) The Plaintiff appealed this case to the appeals court after this Honorable Court granted judgment in the Defendant's favor.

(2) The Appeals Court issued a Order Denying the Appellee's Motion for Summary Action, requesting that the Court affirm the Memorandum Order by this Court.

See (ATTACHMENT 1)

(3) The Plaintiff filed a Motion for a Bench Trial dated July 13, 2007, and this Honorable Court has not responded again to the filing of the Plaintiff's pro-se motions.

Therefore, in the interest of justice, the Plaintiff request that this Honorable Court GRANT the Plaintiff Certification on the claims that was not final and follow the Appeals Courts Order.

CERTIFICATION STANDARD PURSUANT TO RULE 54(b)

This Honorable Court stated in Allis-Chalmers corp. v. Philadelphia Electric Co., 521 F.2d 360 (1975) that this appeal requires us in the first instance to consider the propriety of the district court's 54(b) certification. Although both AC and PECO have focused on the summary judgment disposition as the central issue on this appeal, we cannot reach that issue unless our jurisdiction has been properly invoked by an appealable order. This Court obtains jurisdiction only when an appeal is taken from a final order (28 U.S.C. § 1291) or from an appealable interlocutory order (28 U.S.C. § 1292). As the Supreme Court stated in Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437-38, 76 S.Ct. 895, 900-01, 100 L.Ed. 1297 (1956):

The District Court cannot, in the exercise of its discretion, treat as "final" that which is not "final" within the meaning of § 1291. But the District Court may, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. Rule 54(b) scrupulously recognizes the statutory requirement of a "final decision" under § 1291 as a basic requirement for an appeal to the Court of Appeals.

Hence, our jurisdiction depends upon whether the district court properly granted 54(b) certification. If that Court abused its discretion in certifying the summary judgment as final, we are without jurisdiction to entertain this appeal. See B.B. Adams General Contractors, Inc., v. Department of Housing and Urban Development, 501 F.2d 176 (5th Cir.1974). Since we cannot consider the merits of a non-final order, we turn first to the threshold question of the propriety of the 54(b) certification. See also, In re Good Deal Supermarkets, Inc., 528 F.2d 710, 712 (3d Cir.1975); Brennan v. Kulick, 407 F.3d 603, 606 (3d Cir.2005); Kassuelke v. Alliant Techsystems, Inc., 223 F.3d 929, 931 (8th Cir.2000).

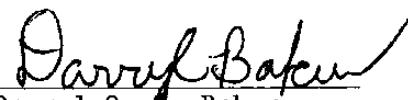
CONCLUSION

The Plaintiff request that this Honorable Court follow the Appeals Court Order and GRANT the Plaintiff a Bench Trial or a Judgment of Certification of Claims that was not made final by this Court.

Respectfully submitted

BY:

Darryl Orrin Baker  
Reg. No.# 19613-039  
Federal Correctional Institution  
P.O. Box 1000  
Sandstone, MN  
55072



EXECUTED: JULY 31, 2007

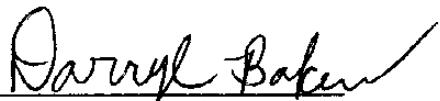
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, the Plaintiff has sent a true and exact copy of the Plaintiff's Motion for Certification on Claims That Where Not Final Pursuant to Fed. Rules. Civ. P. 54(b) this day 31, July, 2007, United States First Class Mail to the following.

Assistant United States Attorney  
Robert L. Eberhardt, Esq.  
Laura S. Irwin, Esq.  
Paul E. Skirtich  
Western District of Pennsylvania  
700 Grant Street, Suite 4000  
Pittsburgh, PA.  
51219

Respectfully submitted

BY:

  
Darryl Orrin Baker  
Reg. No.# 19613-039  
Federal Correctional Institution  
P.O. Box 1000  
Sandstone, MN  
55072

EXECUTED: JULY 31, 2007

**(ATTACHMENT 3)**

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARRYL ORRIN BAKER, )  
Plaintiff, )  
vs. ) Civil Action No. 05-147 ERIE  
UNITED STATES OF AMERICA, et. al., )  
Defendants. )

**ORDER**

AND NOW this 23<sup>rd</sup> day of August, 2007, after consideration of the Plaintiff's Motion for Certification on Claims (Doc #60)

IT IS HEREBY ORDERED that said Motion is DENIED

S/Sean J. McLaughlin  
Sean J. McLaughlin  
United States District Judge

cc: counsel/parties of record NK